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No. 73-398

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

SEYMOUR EMALFARB,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the
Supreme Court of the United States

OCTOBER TERM, 1973

NO.

SEYMOUR EMALFARB,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner, Seymour Emalfarb, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this Petition (Appendix A).

JURISDICTION

The judgment of the Court of Appeals was entered on July 2, 1973 (Appendix B). A timely Petition for Rehearing was denied on August 6, 1973 (Appendix C). This petition is filed within 30 days of the denial of the Petition for Rehearing. The jurisdiction of this Court was invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. In a prosecution for a violation of the Hobbs Act, where the evidence presents an admittedly close case, may an instruction which defines reasonable doubt in terms of proof upon which a jury would "be willing to rely" rather than in terms of doubt which would cause a person to "hesitate to act" as required by *Holland* v. *United States,* 348 U.S. 121 be held to be harmless error?

2. May the defendant's right to be acquitted, unless his guilt be proven beyond a reasonable doubt, a principle founded on due process clause, *In Re Winship,* 397 U.S. 358, be protected by an instruction which incorrectly defines reasonable doubt?

STATEMENT OF THE CASE

The petitioner was indicted, in the United States District Court for the Northern District of Illinois, charged with extortion in violation of 18 U.S.C. 1951 (O.R. 2)[1]

The defendant entered a plea of not guilty and proceeded to trial before the Honorable Hubert L. Will and a jury. A verdict of guilty was returned by the jury. (O.R. 20-21).

---

[1] References to (O.R.) are to the Original Record on Appeal. References to (Tr.) are to the Official Transcript of Proceedings.

The main witness against the defendant was Robert Schreiber. Schreiber owned a trucking company in Hebron, Indiana. He testified that in October of 1966 he received a telephone call from the defendant, an associate of the Secretary of State of the State of Illinois, and the defendant told Schreiber that if he wished to continue running his trucks in Illinois that Schreiber would have to pay the defendant $1500.00 or buy 100 tires from a company owned by the defendant, in which the Secretary of State had an interest. (Tr. 313-320) Schreiber claimed that he refused the defendant's demands and that within hours after the phone call his trucks began to be stopped by the Illinois State Police for overweight violations. (Tr. 323) The record however discloses that the trucks began to be stopped on October 24, 1966, and the phone call did not take place until October 27, 1966. (G. Ex. S.W. 4, Tr. 750)

Schreiber testified that to relieve the pressure of the arrests that he paid the defendant $2,000.00 in four different installments. (Tr. 327)

The defendant admitted receiving the money from Schreiber, but testified that the money was intended by Schreiber to be a contribution to the campaign fund of the Secretary of State. He testified to the phone call on October 27th, 1966 but related an entirely different version of the conversation. He stated that Schreiber called him to use his influence with the Illinois State Police to allow Schreiber to run overloaded trucks in Illinois. The defendant refused to do so. (Tr. 751-753) The defendant testified that later, in November of 1966, he discussed with Schreiber the possibility of assisting him in his business by obtaining new business for him and assisting him

in obtaining special license plates for the State of Illinois. The witness Schreiber appreciated the help that the defendant offered him and also suggested to the defendant that he would like to make a contribution to the campaign fund of the Secretary of State. (Tr. 755-758) These contributions were made and it was the defense contention that they were entirely voluntary and that they had not been extorted in any manner.

The District Court recognized the close evidentiary question when he stated: "I think you have just got a one to one situation, with some corroborative evidence on each side." (Tr. 971)

Against this slim evidentiary background the Court, in its final instructions to the jury, attempted to define the standard of proof beyond a reasonable doubt.

First the Court stated:

> "Now, what do we mean by beyond a reasonable doubt? Well, a reasonable doubt is a fair doubt which arises from all of the evidence in the case. The law doesn't require, in fact, we know it is rarely possible to establish something to an absolute certainty, and that isn't what beyond a reasonable doubt means.
>
> *Beyond a reasonable doubt means the evidence be of such persuasion to you that you would be willing to rely upon that kind of evidence in making an important decision in your own personal lives.* Presumably you would not make an important decision on evidence which was not, did not satisfy you beyond a reasonable doubt. Otherwise you are taking a calculated risk. You are gambling on something. Here you are not supposed to gamble on the guilt or innocence of the defendant. You are to find him innocent unless you are satisfied that his guilt has been established beyond a reasonable doubt." (Tr. 1038-1039) (emphasis added)

In summarizing his instructions to the jury the Court stated:

> "... Start out presuming the defendant to be innocent and the Government must prove his guilt beyond a reasonable doubt, which means by *evidence of such persuasion that you would be willing to rely upon it in an important affair in your own life.*" (Tr. 1061-1062) (emphasis added).

The defendant specifically objected to this instruction:

> "In your instruction on reasonable doubt, I believe both times, both at the beginning and end, you said it was the type of evidence to be satisfied beyond a reasonable doubt, was to have the type of evidence—and I am certainly not as proficient as Mrs. Brennan, but the way I have it, you would be willing to rely upon in your most important life. I think this is not what a reasonable doubt is.
>
> I think a reasonable doubt is the type of doubt that may cause you to hesitate to act in your most important affairs because you may have a doubt in your most important affairs, and a substantial doubt and reasonable doubt, and still go ahead and act. (Tr. 1069).
>
> Mr. Crowley: Proof beyond reasonable doubt is not, in my mind, proof upon which you would be willing to act in the most important of your affairs, but rather the reasonable doubt is a doubt which would cause you to hesitate to act in the most important of your affairs.
>
> The Court: You mean refuse to act?
>
> Mr. Crowley: Hesitate." (Tr. 1070).

The Court, in spite of the specific objection, refused to change this erroneous instruction. A motion for new trial, specifically raising the issue was denied. After sentence a timely notice of appeal was filed. The Court of Appeals for the Seventh Circuit affirmed the judgment. (App. A & B) A timely petition for rehearing was denied. (App. C)

REASON FOR GRANTING THE WRIT

THE DECISION OF THE COURT BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE PROPER FORM OF INSTRUCTION TO BE GIVEN DEFINING REASONABLE DOUBT.

It is, of course, well settled that proof of a criminal charge beyond a reasonable doubt is a constitutionally imposed standard. *Miles* v. *United States,* 103 U.S. 304; *Davis* v. *United States,* 160 U.S. 469, 488; *Holt* v. *United States,* 218 U.S. 245, 253; *Brinegar* v. *United States,* 338 U.S. 160, 174; *Holland* v. *United States,* 348 U.S. 121, 138; *In Re Winship,* 397 U.S. 358, 364.

In order to protect this standard it is necessary to insure, as this Court has repeatedly done, that the quality of proof introduced by the prosecution be examined critically in light of the strict degree of proof necessary for conviction. *E.g., Garner* v. *Louisiana,* 368 U.S. 157; *Thompson* v. *Louisville,* 362 U.S. 199. However, in light of the well settled rule that the credibility of witnesses is exclusively the function of the trier of fact, this Court and Courts of Appeal, in reviewing judgments of conviction must view the evidence in the light most favorable to the government. *Glasser* v. *United States,* 315 U.S. 60, 80. This limited scope of review can become meaningless unless the trier of fact applied the proper standard in returning a verdict of guilty. If the standard used was a preponderance of the evidence, the conviction is unconstitutionally obtained. *In Re Winship,* 397 U.S. 358, 364. If, however, the standard allegedly used is proof beyond a reasonable doubt a different question is presented. Is

it the mere naming of the standard that satisfies the Constitution or must the standard be properly defined? The trier of fact cannot decide a case without appropriate judicial guidance. *Bollenbach* v. *United States*, 326 U.S. 607, 615.

The definition of the term "reasonable doubt" is not an easy question. *Miles* v. *United States*, 103 U.S. 304. However, the lower Federal Courts have not been without guidance from this Court in the proper definition of the standard. *Holland* v. *United States*, 348 U.S. 121. In *Holland*, although refusing to reverse because the instruction adequately defined reasonable doubt, absent the objectionable language, the Court speaking through Mr. Justice Clark stated:

> "We think this section of the charge should have been in terms of the kind of doubt that would make a person *hesitate to act* . . ., rather than the kind upon which he would be willing to act." (emphasis supplied)

The distinction between being willing to act and hesitating to act is substantial and vital to the concept of reasonable doubt. However, the Courts of Appeal have refused to follow the teachings of this Court in *Holland* and have applied different reasoning in failing to reverse convictions obtained from an improper application of the Constitutionally protected standard.

Lower Federal Courts in considering this question have failed to reverse using one of two theories: either the defendant failed to object and thereby waived the error or the instruction as a whole adequately defined the standard, exclusive of the objectionable language. *Scurry* v. *United States*, 347 F.2d 468 (D.C. Cir., 1965) cert. den. 389 U.S. 883; *United States* v. *Restaino*, 369 F.2d 544

(3rd Cir., 1966); *United States* v. *Nuccio,* 373 F.2d 168 (2nd Cir., 1967) cert. den. 387 U.S. 906; *James* v. *United States,* 416 F.2d 467 (5th Cir., 1969) cert. den. 397 U.S. 907; *United States* v. *Dunmore,* 446 F.2d 1214 (8th Cir., 1971) cert. den. 404 U.S. 1041.

The instant case is the first time that the Seventh Circuit has considered this exact question. Cf. *United States* v. *Wright,* 365 F.2d 135 (7th Cir., 1966) cert. den. 386 U.S. 918. However, the Seventh Circuit has refused to follow the teachings of *Holland,* in spite of a specific objection to the Court's charge, a factor not present in other decided cases.

Unless juries in the Federal Courts are properly instructed on the degree of proof necessary to establish guilt beyond a reasonable doubt, that constitutionally protected standard will become a nullity. It is vital to the administration of criminal justice that this Court grant certiorari to resolve this important issue and to guarantee to all defendants a consideration of their cases within the limits of the Constitution.

CONCLUSION

Wherefore, for the foregoing reasons the petitioner respectfully requests that this Court grant the writ of Certiorari to review the judgment of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

In the United States Court of Appeals For the Seventh Circuit

SEPTEMBER TERM, 1972 — JANUARY SESSION, 1973

No. 72-1207

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

SEYMOUR EMALFARB,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 71 CR 443
HUBERT L. WILL, *Judge.*

ARGUED JANUARY 11, 1973 — DECIDED JULY 2, 1973

Before SWYGERT, *Chief Judge,* KILEY and CUMMINGS, *Circuit Judges.*

SWYGERT, *Chief Judge.* Defendant-appellant Seymour Emalfarb appeals, after a jury trial, his conviction on three counts of extortion in violation of 18 U.S.C. § 1951. He received concurrent sentences of three years in the Attorney General's custody: a ninety-day period confined to a jail-type or treatment institution with the remainder to be probation. He was also fined $5,000.

The defendant raises five issues on appeal: (1) the sufficiency of the evidence, (2) the trial judge's prejudicial comment to the jury that they would have no difficulty in determining the victim's state of mind, (3) the failure of the trial judge to give a missing witness instruction, (4) an erroneous instruction defining reasonable doubt, and (5) the refusal of the trial judge to instruct on the defendant's theory of the case.

Defendant was the president, general manager, and salesman for Statewide Tire Company. The company was incorporated in 1959 by Emalfarb, Paul Powell, Clyde Choate, and C. W. Davis.[1] Statewide sold tires to the Illinois Tollway Commission in 1962, 1963 and 1964 for use on official cars. The defendant had frequent contact with the state police officers assigned to patrol the Illinois Tollways and was often seen at the headquarters.

Robert Schreiber, the victim of the alleged extortion owned his own trucking company in Hebron, Indiana. His company had about sixty trucks which carried sand and stone between Chicago and Gary, Indiana. Schreiber testified that the defendant called him in October 1966 and told him that he (Schreiber) had been running his trucks through Illinois for the last three years and "had not contributed to the Powell cause" and that he should pay $1,500 cash or buy 110 tires. Schreiber stated that he refused. Immediately after that telephone conversation, Schreiber's trucks were increasingly stopped and ticketed by Illinois state police. On November 9, 1966 the day

[1] Powell transferred his stock in the company to Choate in 1964 for one dollar, but the formal change in registration of the stock did not represent a substantial change in economic interest.

after Paul Powell was elected Secretary of State in Illinois,[2] the defendant telephoned Schreiber and asked: "Are you ready to say uncle?" Schreiber proceeded to reduce by negotiation the requested $1,500 sum to $1,000. On the following day, November 10, 1966, Schreiber met the defendant at a motel parking lot. They went into the motel coffee shop and Schreiber gave the defendant $1,000 in cash. The defendant excused himself and made a telephone call. As he returned, a state police car drove away from the motel. The defendant in referring to the departing police car told Schreiber: "See what powers I have." After the exchange of money, Schreiber's trucks were infrequently ticketed. Schreiber in response to a later telephone call paid defendant another $500 in cash on December 5, 1966. A third payment of $500 in response to another call occurred on January 4, 1967 when Schreiber gave the manager of defendant's office a check payable to cash which the manager proceeded to cash. The manager did not remember what he did with the proceeds.

The defendant's defense is that these payments were Schreiber's voluntary contributions to Paul Powell's campaign funds in hope of receiving favorable licenses from the recently elected Secretary of State.

I

The defendant argues that the evidence was insufficient to sustain a conviction since Schreiber's testimony that the harassment followed the initial telephone call by Schreiber is contradicted by the existence of a telephone call slip which indicated a phone call was made from

[2] Powell was formerly the Speaker of the Illinois General Assembly and Choate was a member of the Illinois General Assembly.

defendant's Statewide Tire Company to Schreiber's company on October 27, 1966 and that Schreiber's trucks had received tickets on October 24 and October 26 prior to the telephone call of October 27th. There is no evidence as to who made or received the telephone call on October 27, 1966. The existence of a telephone call on October 27, 1966 does not refute Schreiber's testimony for there is no evidence of the parties to, or subject of, the call. This information about the telephone call of October 27, 1966 was evidence before the jury. The alleged contradiction was argued in defense counsel's summation. The jury apparently decided the credibility issue adverse to the defendant.

Defendant also argues that the Government failed to prove a connection between the defendant and the ticketing of Schreiber's trucks. The actual issue to be decided here was not whether the defendant had the power to have Schreiber's trucks stopped and ticketed but whether it was reasonable for Schreiber to believe that he had that power.

The evidence supports the jury finding that defendant was guilty on the three counts of extortion.

II

Defendant argues that the trial judge erred in commenting to the jury on the possible inference to be drawn from Schrieber's testimony as to his state of mind after the telephone call by the defendant in October 1966. The record shows that the following occurred while Schreiber was being directly examined by the assistant United States Attorney:

Q. What did you interpret by this [telephone conversation]?

MR. CROWLEY: Objection.

THE COURT: Sustained.

Q. Well, what was your state of mind?

MR. CROWLEY: Objection.

THE COURT: Sustained. The jury is going to have to figure out what Mr. Schrieber's state of mind was from the conversation, and his testimony with respect thereto, and I don't think they will have much difficulty.

Defense counsel did not move to strike the trial judge's comments or to give the jury a cautioning instruction.

Although the trial judge's comment appears to be ambiguous, we do not think that the trial judge should have made such a comment since it was uncalled for and might have under other circumstances prejudiced the defendant's case. However, in this case, we believe that the comment was harmless error in light of the judge's later charges to the jury:

> Let me lay a ghost to rest here if it seems appropriate. Sometimes jurors think the way to decide a case is to read the judge's mind and figure out how the judge would decide the case. They try to figure out from circumstantial evidence what the judge may have said, or how he looked, or what have you, what his verdict in the case would be.
>
> Let me tell you, you couldn't read my mind if you tried. I have an unreadable mind, impervious skull my wife says, but I will save you the trouble. I will tell you what I think the verdict in this case should be.
>
> It is my considered judgment that the verdict in this case should be what the 12 of you unanimously decide. That is it.

On the specific issue of Schreiber's state of mind, the judge's charge eliminated any possible prejudice to the defendant from his ambiguous but unfortunate comment. He stated:

> You are not bound by the statements of either Mr. Schreiber or any of the other people as to what his state of mind was. You can conclude from the evidence, all of the evidence, that in fact he couldn't reasonably have had that state of mind, or you may conclude from the evidence that he could reasonably have had the state of mind which he testified to. . . .

The defendant's cited authority dealing with a trial judge's comments on testimony and other evidence is not precedent for reversal in this case since the judge gave sufficient cautionary instructions. Moreover, his comments were ambiguous and did not directly express an opinion that Schreiber's testimony was worthy or unworthy of belief. *United States* v. *Kwitek,* 433 F.2d 18, 20 (7th Cir. 1970).

III

Defendant argues that the trial judge erred in denying a missing witness instruction since the Government failed to call Trooper Lewandowski who issued a ticket to one of Schreiber's trucks on November 22, 1966. The theory of the Government's case was that between the threatening phone call of the defendant in October 1966 and the post-election telephone call on November 9, 1966, Schreiber's trucks were subjected to increased stoppings and tickets by the Illinois state police and that this harassment stopped after Schreiber gave the defendant $1,000. Lewandowski's testimony as to the circumstances concerning the ticket on November 22, 1966 was not relevant to the Govern-

ment's theory. The ticket was only introduced to establish the infrequency with which Schreiber's trucks were stopped except during the harassment period. Lewandowski had no "special information relevant to the case." C. McCormick, Evidence § 249, at 534 (1954). The instruction was properly refused.

IV

Defendant also challenges the instruction on reasonable doubt given by the trial judge over objection. The trial judge first stated:

> Now, what do we mean by beyond a reasonable doubt? Well, a reasonable doubt is a fair doubt which arises from all of the evidence in the case. The law doesn't require, in fact, we know it is rarely possible to establish something to an absolute certainty, and that isn't what beyond a reasonable doubt means.
>
> Beyond a reasonable doubt means the evidence be of such persuasion to you that you would be willing to rely upon that kind of evidence in making an important decision in your own personal lives. Presumably you would not make an important decision on evidence which was not, did not satisfy you beyond a reasonable doubt. Otherwise you are taking a calculated risk. You are gambling on something. Here you are not supposed to gamble on the guilt or innocence of the defendant. You are to find him innocent unless you are satisfied that his guilt has been established beyond a reasonable doubt.

He later summarized his instruction on "reasonable doubt":

> Start out presuming the defendant to be innocent and the Government must prove his guilt beyond a reasonable doubt, which means by evidence of such persuasion that you would be willing to rely upon it in an important affair in your own life.

That part of the charge which is specifically attacked reads: "Beyond a reasonable doubt means the evidence be of such persuasion to you that you would be willing to rely upon that kind of evidence in making an important decision in your own personal lives." In support of his contention that this instruction was erroneous, the defendant cites *Holland* v. *United States,* 348 U.S. 121, 140 (1954). There the Supreme Court in criticizing a similar instruction stated: "We think this section of the charge should have been in terms of the kind of doubt that would make a person hesitate to act . . . rather than the kind on which he would be willing to act." The Supreme Court, however, did not reverse by reason of the criticized language contained in the definition of reasonable doubt. Similarly, a number of courts of appeals, following the observation in *Holland,* have indicated a preference for the "hesitancy to act" approach instead of the "willing to rely" formulation; but like the Supreme Court in *Holland* they have not seen fit to reverse cases in which the criticized language has been used. It must be pointed out, however, that some seem to have based their refusal on the fact that no objection had been raised during the trial and that invocation of the plain error rule was not in order. *Scurry* v. *United States,* 347 F.2d 468 (D.C. Cir. 1965), *cert. denied,* 389 U.S. 883 (1967); *United States* v. *Restaino,* 369 F.2d 544, 546 (3d Cir. 1966); *United States* v. *Nuccio,* 373 F.2d 168, 174 (2d Cir.), *cert. denied,* 387 U.S. 906 (1967); *James* v. *United States,* 416 F.2d 467, 475-76 (5th Cir. 1969), *cert. denied,* 397 U.S. 907 (1970); *United States* v. *Dunmore,* 446 F.2d 1214, 1221-28 (8th Cir. 1971), *cert. denied,* 404 U.S. 1041 (1972); *United States* v. *Cole,* 453 F.2d 902, 906 (8th Cir.), *cert. denied,* 406 U.S. 922 (1972); *cf. United States* v. *Wright,* 365 F.2d 135, 140 (7th Cir. 1966), *cert. denied,* 386 U.S. 918 (1967).

Considering the district court's instruction on reasonable doubt as a whole, we are constrained to find no reversible error here despite the fact that the defendant raised a timely objection to the charge as given. We are in general accord with Judge Friendly's observations in *Nuccio* that "While the 'hesitate' language makes the point considerably better and we wish trial judges would use it, we find it impossible to believe, in the absence of any evidence such as a request for further instructions, that jurors would retain such a nuance in their minds and be significantly influenced by it." Moreover, we are in agreement with the other circuits that have dealt with this problem in their admonition that in attempting a definition of reasonable doubt language phrased in terms of hesitancy to act is the preferred formulation. We expect the district judges in this circuit to do so.

V

Finally, defendant argues that the trial judge refused to give his tendered instruction on the defense theory. The judge ruled that the defense theory had been given in another instruction. We agree and find that the instruction that he gave on coerced versus voluntary payments was the better instruction and that it included defendant's theory of the case. Defendant is not entitled to have a particular instruction, only to have the theory of his defense given. "Where the jury is fully and fairly instructed upon the case as a whole it is unnecessary to give any specific instruction in the precise form requested by the defendant." *United States* v. *Pritchard*, 458 F.2d 1036, 1040 (7th Cir.), *cert. denied*, 407 U.S. 911 (1972).

The judgment of conviction is affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

July 2, 1973

Before
Hon. Luther M. Swygert, Chief Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1207 vs.
SEYMOUR EMALFARB,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of conviction of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, in accordance with the opinion of this Court filed this day.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

August 6, 1973

Before
Hon. Luther M. Swygert, Chief Judge
Hon. Roger J. Kiley, Circuit Judge
Hon. Walter J. Cummings, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1207 vs.
SEYMOUR EMALFARB,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois
Eastern Division
(71 CR 443)

On consideration of the petition for rehearing and suggestion that it be heard *en banc* filed in the above-entitled cause, no judge in active service having requested a vote thereon, nor any judge voted to grant the suggestion, and a majority of the members of the panel having voted to deny a rehearing,

IT IS ORDERED that the petition for rehearing in the above-entitled cause be and the same is hereby denied.